

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0145
Responsible Officer Liability—Duty to Remit Sales Tax
For Tax Year 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; 45 IAC 2.2-2-2; 45 IAC 2.2-9-4; *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales tax not paid during the assessment period.

STATEMENT OF FACTS

Taxpayer protests the Department's determination of responsible officer liability, based on the following facts. Taxpayer is only a minority shareholder in the business whose sales tax liability is at issue in this protest. The business, a golf course located in southern Indiana, is owned by husband and wife, Mr. and Mrs. B. Taxpayer, who is located in Indianapolis, visited the business approximately two years ago. He has never had access to the financial system. He was never a signatory or guarantor on any accounts or loans. He has never been authorized to execute checks or legal documents. Additional facts will be supplied as necessary.

I. Responsible Officer Liability—Duty to Remit Sales and Withholding Taxes

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." See, IC § 6-2.5-2-1 and 45 IAC 2.2-2-2.

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC § 6-2.5-9-3 is applicable:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC § 6-2.5-3-2) to the department;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes to the state.

See also, 45 IAC 2.2-9-4.

In order to determine which persons are personally liable for the payment of these “trust” taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995) is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail and the withholding tax.... An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that the taxes are paid.

The Indiana Supreme Court in *Safayan* identified three relevant factors:

- (1) the person’s position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person’s employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in *Safayan* that “where the individual was a high ranking officer, we presume that he or she had sufficient control over the company’s finances to give rise to a duty to remit the trust taxes.” *Id.* at 273. The Department further notes that *Safayan* specifically rejects the defense of failure by an officer to exercise oversight.

Taxpayer has provided documents, and the Department records corroborate those documents, showing that taxpayer was a passive investor in the business. As such, taxpayer had no active involvement in the management of the business.

The Department finds that taxpayer has provided sufficient evidence to overturn the Department's initial determination of responsible officer liability.

FINDING

Taxpayer's protest concerning the Department's determination of responsible officer liability for unpaid gross retail taxes is sustained.